82-916

No.

In the
Supreme Court of the United States

RICHARD A. HERBERT,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT

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QUESTIONS PRESENTED FOR REVIEW

I. Should the required records exception to the fifth amendment be applied in a grand jury proceeding?

II. Have the records sought by the grand jury assumed public aspects sufficient to warrant application of the required records exception?

III. Should a physician's participation in a public aid program be construed as an implied waiver of fifth amendment protection?

LIST OF PARTIES

All parties appear in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT

Petitioner RICHARD A. HERBERT, prays that a writ of certiorari be issued to review the judgment of the Illinois Appellate Court upon which the Illinois Supreme Court, the highest Court of the State, denied leave to appeal.

CITATIONS TO OPINION BELOW

The opinion of the Illinois Appellate Court is reported as *People of the State of Illinois* v. *Richard A. Herbert,* 108 Ill. App. 3rd 143 (1982), and is attached as Exhibit A.

JURISDICTIONAL BASIS

On June 29, 1981 petitioner was held in contempt of court. The Illinois Appellate Court affirmed the judgment on July 20, 1982. A petition for leave to appeal to the Illinois Supreme Court was denied on October 5, 1982, and is attached as Exhibit B. Petitioner seeks a writ of certiorari pursuant to 28 U.S.C. 1257 (3).

STATUTES INVOLVED

U.S. Const. amend. V:

> [No person] shall be compelled in any criminal case to be a witness against himself . . .

STATEMENT OF CASE

On February 9, 1981, the February 1981 Grand Jury served to Richard A. Herbert, M.D., a subpoena *duces tecum* identifying Dr. Herbert as a target of an investigation of theft and violations of other Illinois statutes, and commanding him to appear before the Grand Jury and produce medical records of 46 patients. On February 26, 1981, Dr. Herbert appeared before the Grand Jury, but, citing his fifth amendment privilege against self-incrimination he declined to produce the requested documents. The Attorney General filed a petition for a rule to show cause, and later an amended petition. Before the court ruled on the matter, however, the term of the February 1981 Grand Jury terminated.

Thereafter, the June 1981 Grand Jury issued a fresh subpoena requesting the same documents sought previously by the February 1981 Grand Jury. Essentially, the Attorney General alleged in it's petition that Dr. Herbert was a target defendant in the grand jury's investigation of possible thefts from the Illinois Medicaid

Program and that since Dr. Herbert maintained the subpoenaed records pursuant to participation in the program the records fell within the "required records" exception to the fifth amendment privilege against self-incrimination. Accordingly, the Attorney General argued that Dr. Herbert could not invoke his privilege against self-incrimination.

At a hearing held on June 24, 1981, the Attorney General, while conceding that Dr. Herbert never signed any agreement specifically to maintain medical records of Medicaid recipients, argued that each time a physician submits a bill to the Illinois Department of Public Aid he impliedly agrees that he is subject to that department's reporting and record keeping requirements. On June 29, 1981 the court held that Dr. Herbert waived his fifth amendment privilege when he submitted himself to the general records requirements of the Illinois Medicaid Program. The court found Dr. Herbert in contempt of court for refusing to produce the medical records.

Dr. Herbert filed a timely notice of appeal to the Illinois Appellate Court on July 17, 1981. On July 20, 1982, after the case had been briefed and argued, the Illinois Appellate Court affirmed the trial judge's order. The panel agreed with the trial judge that the records sought fell within the "required records" exception to the fifth amendment privilege against self-incrimination. From this adverse decision, Dr. Herbert sought leave to appeal to the Illinois Supreme Court, which was denied. From their rulings he now seeks relief from the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

THE TARGET OF A GRAND JURY INVESTIGATION CANNOT BE DEPRIVED OF HIS FIFTH AMENDMENT PRIVILEGE BY OPERATION OF A DOCTRINE FORMULATED TO PROMOTE THE EFFICIENT ADMINISTRATION OF PUBLIC AID PROGRAMS. FURTHERMORE, ANY WAIVER OF THE FIFTH AMENDMENT PRIVILEGE MUST BE KNOWING, VOLUNTARY, AND INTELLIGENT, RATHER THAN IMPLIED.

This Court has never directly decided whether the required records exception to the fifth amendment, first formulated in *Shapiro* v. *United States,* 335 U.S. 1 (1948), and later refined in *Grosso* v. *United States,* 390 U.S. 62 (1968), applies when the target of a grand jury investigation opposes a subpoena *duces tecum* by invoking his fifth amendment privilege. The decision below, affirming the trial court's contempt order, vastly expands the scope of the required records exception, and for the first time applies the exception in a grand jury context. Thus, the decision below requires review for several compelling reasons. First, to consider whether the required records exception should be applied in a grand jury context. Second, to prevent confusion in the courts below by determining the proper construction of *Grosso's* three prong test. Finally, review is necessary to reaffirm the previous decisions of this Court which have required that an effective waiver of fifth amendment rights be knowing, voluntary and intelligent.

A.

BECAUSE OF THE FUNDAMENTAL DIFFERENCE BETWEEN A GRAND JURY INVESTIGATION AND AN ADMINISTRATIVE AGENCY'S INVESTIGATION, THE REQUIRED RECORDS EXCEPTION TO THE FIFTH AMENDMENT SHOULD NOT BE APPLIED IN A GRAND JURY PROCEEDING.

As first formulated in *Shapiro* v. *United States*, 335 U.S. 1 (1948), the required records exception provided that record-keeping requirements which are imposed in aid of a valid regulatory statute render the documents maintained pursuant to that statute unprivileged in an investigation by the administrative agency charged with enforcing the regulatory program. *Shapiro*, however, in no way addresses the crucial issue of a grand jury's ability to compel production of a sole proprietor's documents. Certainly the focus of a grand jury's criminal investigation is vastly different than an administrative agency's regulatory investigation. Thus, the logic behind this Court's recognition of the required records exception, and the significant curtailment of fifth amendment protection it represents, is much more compelling when viewed as peculiar to the facts of the *Shapiro* case.

In *Shapiro*, this Court construed the immunity provisions of the Emergency Price Control Act. *Id.* at 5-6. After noting that the legislation before the Court had been enacted as an emergency measure necessary to the nation's war efforts, the Court went on to find that the purpose of the legislation was to empower the Administrator to compel the production of documents necessary in the administration and enforcement of the statute and regulations. *Id.* at 15. *Shapiro*, therefore, must be viewed as support for an administrator's broad powers to discern

compliance with administrative regulations in a time of extreme emergency. The thrust of *Shapiro* was not to emasculate the fifth amendment privilege of a target witness before a grand jury, but to prevent wholesale claims of privilege in response to administrative inquiry.

In contrast to the fifth amendment protection recognized in the context of an administrative proceeding under *Shapiro,* a target witness before a grand jury has significantly broader protection. It is a well-settled rule of law that the fifth amendment privilege against compulsory self-incrimination not only protects an individual from compelled production of his personal papers and effects, but also "applies to the business records of the sole proprietor . . ." *Bellis* v. *United States,* 417 U.S. 85, 87-88 (1974); *In Re Grand Jury Proceedings,* 601 F.2d 162, 168 (5th Cir. 1979); *United States* v. *Plesons,* 560 F. 2d 890, 893 (8th Cir. 1977). Moreover, it is beyond doubt that this fifth amendment privilege protecting the business records of a sole proprietor extends to grand jury proceedings. *United States* v. *Washington,* 431 U.S. 181, 186 (1977); *United States* v. *Plesons,* 560 F. 2d 890,892 (8th Cir. 1977).

The instant case illustrates the tension between a grand jury's investigative function and the well-recognized right of a grand jury witness to raise the fifth amendment as a bar to the production of documents. The interjection of *Shapiro's* required records exception into the grand jury process would serve only to upset the delicate balance between competing interests and tilt the scales overwhelmingly in favor of an accusatorial institution.

Unlike other aspects of the criminal justice system, a grand jury's inquiries are secret and roving. Dangerous

opportunities for oppression and unfairness abound due to the accusatorial character of a grand jury, and are compounded by the absence of judicial supervision. In contrast to the investigations of an administrative agency, which are a matter of public record and intended merely to detect practices at variance with administrative requirements, a grand jury investigation is shrouded in secrecy and may result in criminal indictment. Thus, the interests supporting the fifth amendment, such as protection against governmental coercion, encouragement of fair and complete law enforcement detection practices, and preservation of the adversarial nature of the criminal justice system, would be severly compromised if the required records exception is held to apply to the records of a grand jury target witness.

Independent of its ramifications on the grand jury process, the decision below enables Congress or a state legislature to emasculate the constitutional protection against self-incrimination by passing a regulating statute. This Court has repeatedly struck down such efforts by Congress in the past. *See e.g. Haynes* v. *United States,* 390 U.S. 85 (1968) (firearms regulation); *Grosso* v. *United States,* 390 U.S. 62 (1968) (wagering tax); *Marchetti* v. *United States,* 390 U.S. 39 (1968) (wagering tax). In each of those cases, this Court focused on the statutes and regulations that led to subpoenas to produce documents, just as *Shapiro* considered the act and regulations of the Emergency Price Control Act. In the cases cited immediately above, however, this Court struck down the efforts to acquire the documents because each piece of legislation evinced a thinly disguised subterfuge to compel individuals to waive their constitutional rights. Yet the decision below would sanction such legislation: if this

court should hold that a government agency such as a grand jury could acquire otherwise privileged documents simply because the agency charged with enforcement may be able to see those documents pursuant to its enforcement and maintenance functions, then a legislative body could obliterate fifth amendment protection through the subterfuge of simply passing a regulatory statute.

The required records exception, therefore, has no applicability to the records of a sole proprietor called to testify as the target of a grand jury investigation. Review of the decision below is necessary to ensure a proper balance between an individual's privilege against self-incrimination and society's interest in broad disclosure before a grand jury.

B.

REVIEW IS NECESSARY TO PREVENT CONFUSION IN THE COURTS BELOW.

In *Grosso* v. *United States*, 390 U.S. 62 (1968), this Court refined the required records exception and held that where an individual is required by the government to keep records, those records are subject to disclosure if the following three factors exist: (1) the purpose of the record keeping requirements must be essentially regulatory (2) the records must be of a kind customarily kept; and (3) the records themselves must have assumed public aspects. *Id.* at 67-68. Although Dr. Herbert does not quarrel with the articulation of the exception, he submits that the paucity of case law in this area induced the lower courts to misapply the exception when analyzing the facts in this case. Confusion regarding the application of *Grosso's* three prong test, however, is not limited to this case alone. The lower courts have been applying the *Grosso* test with widely disparate results.

In *United States* v. *LaPage*, 441 F. Supp. 824 (N.D.N.Y. 1977), the Defendants were ordered to surrender documents which they had maintained pursuant to the regulations of the New York Department of Agriculture and Markets. The *LaPage* court reasoned that the third prong of the *Grosso* test was met by virtue of the regulations that required the maintenance of the records sought by the government. Under the *LaPage* rationale, the regulatory statute which requires that records be maintained, thereby satisfying the first prong of the *Grosso* test, would also serve to imbue the records with public aspects sufficient to satisfy the third prong of that test. Such a construction renders the third prong a redundancy, and could never have been contemplated by the *Grosso* court.

A different analysis was utilized by the Eighth Circuit in *United States* v. *Plesons*, 560 F.2d 980 (8th Cir. 1977). In *Plesons*, a physician received a grand jury subpoena demanding patient records disclosing drug prescriptions. Although the defendant in *Plesons* failed to raise his fifth amendment privilege in a timely fashion, the court concluded that the records would have been privileged had he done so. Relying on *Bellis* v. *United States*, 417 U.S. 85 (1974), the *Plesons* court held that patient folders and their contents were privileged from disclosure. *United States* v. *Plesons*, 560 F. 2d 890, 893 (8th Cir. 1977).

Although the records sought by the grand jury in the instant case are of a type customarily kept by the Appellant, the other two prongs of the *Grosso* test have not been met. The purpose of the grand jury investigation is not regulatory: while the Illinois Medicaid Program's enforcement provisions exist to regulate the program, the grand jury seeks to identify criminal violators. Thus, the subpoena here should be quashed because it does not meet

Grosso's first prong that excepts records only where the purpose of the legislation is essentially regulatory. If this Court finds that the state requires these records as a check on possible criminal activity, then the records are not maintained for regulatory purposes and therefore do not fall within the required records exception. If the records are maintained to monitor compliance with the Illinois Medicaid Statute, then the only agency with any arguable right to view those records would be the Illinois Department of Public Aid. Simply because the right against self-incrimination may be arguably waived to enable the Department of Public Aid to monitor compliance with its provisions does not mean that a grand jury can now automatically view documents that would otherwise be protected.

Nor do the records sought here come under the third prong of *Grosso*, which requires that the records acquire "public aspects." The decision below bypassed this issue by holding that the records sought assumed public aspects because the Department of Public Aid could inspect the records for documentation of claims and analysis of the operation of the Medicaid system. Under this reasoning, documents required to be kept would automatically be considered "public records," rendering the third prong of *Grosso* superfluous. In *Grosso*, this Court held that simply because the documents were desired by the government did not render the information "public." *Grosso* v. *United States*, 390 U.S. 62, 68 (1968). Thus, the "public aspects" requirement must have meaning additional or apart from the other prongs of the "required records" exception.

The instant case involves medical records which are among the most private of documents. Patients expect that information disclosed to their physicians will remain confidential, and Illinois has expressed its concern for this confidentiality through the enactment of a law that authorized disclosure only in narrowly delineated circumstances. Thus, the records sought by the government in the instant case contrast starkly with cases where the records required are not ordinarily shrouded in privacy. Records containing private medical information cannot be classified as records having "public aspects" merely because the records are maintained to satisfy agency reporting requirements.

Therefore, the records in question do not have "public aspects," and the decision below requires review to prevent a significant expansion of the required records exception, and a concomitant curtailment of fifth amendment protection.

C.

ANY WAIVER OF THE FIFTH AMENDMENT PRIVILEGE MUST BE KNOWING, VOLUNTARY, AND INTELLIGENT, RATHER THAN IMPLIED.

Although the decision below did not specifically address the issue, the trial court held that the Petitioner impliedly waived his privilege against self-incrimination when he participated in the Illinois Medicaid Program. That holding ignores this Court's consistent pronouncements that waivers of constitutional rights must not only be voluntary but must be "knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady* v. *United States*, 397 U.S. 742, 748 (1970); *accord*, *People* v. *Johnson*, 75 Ill. 2d 180, 187, 387 N.E. 3d 688 (1979).

Nothing in the record of the case at bar indicates that the petitioner knowingly waived his rights. The mere act of participation in a public aid program cannot put a physician on notice that his continued participation will result in a waiver of his privilege against self-incrimination. *Cf. Morgan* v. *Thomas,* 448 F. 2d 1356, 1363 (5th Cir. 1971) (privilege could not be waived by prior contract which did not contemplate circumstances under which exercise of the privilege would be appropriate.)

The rationale advanced by the trial court would allow a state to condition a physician's participation in a public aid program on the physician's consent to waive his fifth amendment privilege. The Court has repeatedly rejected this notion in the past, reasoning that a waiver of the fifth amendment which is secured by the exaction of a price is compelled and ineffective. *Garrity* v. *New Jersey,* 385 U.S. 493, 500 (1967). If a person is forced to choose between waiving his fifth amendment privilege or foregoing another substantial benefit, there is no choice at all. *Davis* v. *Wainwright,* 349 F. Supp. 39, 42 (M. D. Fla. 1971). *See also Lefkowitz* v. *Turley,* 414 U.S. 70, 82-83 (1973) (Where a substantial economic sanction is used to secure a waiver, the waiver is not voluntary).

In the instant matter, review is necessary to prevent a gross deviation from this Court's previously delineated standard. The Petitioner could never have impliedly waived his privilege against self-incrimination. Such a "waiver" is deficient because it operates independent of any actual knowledge on the part of the person claiming that privilege, and because it conditions participation in a state sponsored program on a consent to waive a fundamental constitutional right.

CONCLUSION

For the foregoing reason, Petitioner respectfully requests that a writ of certiorari be issued to review the judgments below.

Respectfully submitted,

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APPENDIX

"EXHIBIT A"

THE PEOPLE OF THE STATE OF ILLINOIS,
Petitioner-Appellee,

v.

RICHARD A. HERBERT, M.D.,
Respondent-Appellant.

First District (2nd Division) No. 81-1798

Judgment affirmed.

Opinion filed July 20, 1982.

1. POOR (§15)—*physician participating in Medicaid program is required to keep records required by statute.* Licensed physician who participates in State Medicaid program is required to keep medical records in accord with statutes and agency rules satisfying minimum Federal Medicaid standards (Ill. Rev. Stat. 1979, ch. 23, par. 5-5).

2. POOR (§15)—*records required to be kept pursuant to Medicaid program constituted "required records" for purposes of exception to fifth amendment privilege.* Medical records required to be kept for purpose of monitoring State's Medicaid program qualified as "required records" prerequisite for exception to fifth amendment privilege of participating physician, where they were essentially of regulatory nature and not intended for purpose of prosecuting criminals, even though they were sought pursuant to grand jury proceedings investigating suspected criminal activity of physician.

3. WITNESSES (§144)—*records kept pursuant to Medicaid program had "public aspects" for purposes of exception to fifth amendment privilege.* Medical records which were required to be kept by physicians participating in State Medicaid program, and were available for inspection by public officials for documentation of claims and analysis of operation of Medicaid system, assumed "public aspects" so as to qualify for one of prerequisites to exception to fifth amendment privilege raised by participating physician in grand jury proceeding.

4. GRAND JURY (§16)—*physician had no fifth amendment privilege with regard to records required to be kept pursuant to Medicaid program.* Sole proprietor physician who participated in State Medicaid program had no privilege against self-incrimination in grand jury proceedings requiring him to produce essentially regulatory and customarily kept medical records which assumed public aspects and were required to be maintained by law.

5. WITNESSES (§144)—*physician-patient privilege was waived for purposes of records required to be kept pursuant to Medicaid program.* Physician-patient privilege regarding records of patient-participants in State Medicaid program were properly found to be voluntarily and intelligently waived for purpose of production in grand jury proceedings, where patients' signatures were on statutory written forms authorizing release of medical information, and Medicaid agents who witnessed signatures were available and subject to cross-examination thereon (Ill. Rev. Stat. 1981, ch. 110, par. 8-802(3)).

Appeal from the Circuit Court of Cook County; the Hon. Richard J. Fitzgerald, Judge, presiding.

James I. Marcus, of Chicago (Williams & Marcus, Ltd., of counsel), for appellant.

Tyrone C. Fahner, Attorney General, of Springfield (Michael B. Weinstein and Michael J. Brennan, As-

sistant Attorneys General, of Chicago, of counsel), for the People.

JUSTICE DOWNING delivered the opinion of the court:

Respondent Richard A. Herbert, M.D., a physician licensed to practice medicine in the State of Illinois, was held in contempt of court for failure to comply with a *subpoena duces tecum* issued by the Cook County grand jury seeking production of certain medical records. In this court, and previously in the circuit court, respondent contends that the material requested in the subpoena is protected by both the self-incrimination clause of the fifth amendment and the physician-patient privilege.

The Cook County grand jury, in an investigation conducted by the Illinois Attorney General, issued a subpoena naming respondent as a target of the grand jury investigation and requested production of "any and all original records of treatment, examination, prescriptions, and visits which were generated and/or acquired by [respondent] for the period of January 1, 1979 through and including December 31, 1979, for those patients whose names and dates of birth are listed on the attached Rider • • • who were Public Aid recipients and for whom [respondent] billed under the Illinois Medicaid Program of the State of Illinois." The rider listed 46 names.

Subsequently, agents from the Illinois Department of Law Enforcement (IDLE) obtained the signatures of all persons listed on the rider on the following form, entitled "Authorization for Release of Medical Information":

> "I, ..., do hereby authorize full disclosure of all medical records concerning myself and minor children in my custody to any duly authorized agent of the Office of the Attorney General of the State of Illinois, or the Illinois Department of Law

Enforcement, whether the said records are of a private, public, or confidential nature.

The intent of this authorization is to give my consent for full and complete disclosure of medical treatment that may have been performed by or may pertain to services rendered to myself, minor children in my custody by hospitals, clinics, physicians, dentists, and the U.S. Veteran's Administration.

I have read and fully understand the contents of this 'Authorization for Release of Medical Information.' "

The two agents who obtained the signatures testified at the contempt hearing in the circuit court that they read and explained the form to each person who signed it, and that all persons signed the authorization in the presence of the agents. Although counsel for respondent was granted a continuance so that he could have an opportunity to call witnesses regarding the authorization forms, none testified.

The circuit court found respondent in contempt of court and ordered him incarcerated until he purged himself of contempt. The order of incarceration was stayed pending appeal.

I

Respondent initially contends that the self-incrimination clause of the fifth amendment protects him from the disclosure sought by the subpoena. The fifth amendment to the United States Constitution provides, in pertinent part, "[n]o person • • • shall be compelled in any criminal case to be a witness against himself." This clause is applied to the states through the fourteenth amendment. (*Malloy* v. *Hogan* (1964), 378 U.S. 1, 8, 12 L. Ed. 2d 653, 659-60, 84 S. Ct. 1489, 1493-94). The State argues that the "required records" exception to that clause applies here, and thus respondent is not protected by the fifth amendment. The circuit court, apparently holding that the "required records" exception applied, held

that respondent could not assert the fifth amendment privilege.

Initially, we note that the fifth amendment protects the business records of a sole proprietor from compulsory disclosure to the grand jury, (*Bellis* v. *United States* (1974), 417 U.S. 85, 87-88, 40 L. Ed. 2d 678, 683, 94 S. Ct. 2179, 2182-83.) Respondent conducted his practice as a sole proprietor. The required records exception to the fifth amendment was first recognized in *Shapiro* v. *United States* (1948), 335 U.S. 1, 92 L. Ed. 1787, 68 S. Ct. 1375, and refined in *Grosso* v. *United States* (1968), 390 U.S. 62, 67-68, 19 L. Ed. 2d 906, 912, 88 S. Ct. 709, 713. Essentially, the exception holds that where an individual is required by the government to keep records, those records are subject to disclosure if the following three factors exist: (1) the purpose of the record keeping requirement must be essentially regulatory; (2) the records must be of a kind customarily kept; and (3) the records themselves must have assumed public aspects.

The State contends that the records requested by the subpoena are required to be kept by the statutes and regulations governing the operation of the Medicaid system in Illinois. The State further contends that these records satisfy the requirements of *Grosso*.

The rules and regulations of the Illinois Department of Public Aid (DPA) must satisfy minimum Federal standards described in title XIX of the Social Security Act, commonly referred to as Medicaid. The Federal records requirements of the Social Security Act (42 U.S.C.A. sec. 1396(a) (1982 Supp.)) state in relevant part:

"(a) A State plan for medical assistance must—

• • •

(27) provide for agreements with every person or institution providing services under the State plan under which such person or institution agrees (A) to keep such records as are necessary fully to disclose the extent of the services provided to individuals re-

ceiving assistance under the State plan, and (B) to furnish the State agency or the Secretary with such information, regarding any payments claimed by such person or institution for providing services under the State plan, as the State agency or the Secretary may from time to time request * * *."

The Federal requirement is implemented through section 5—5 of the Illinois Public Aid Code, which provides in part:

"All dispensers of medical services shall be required to maintain and retain business and professional records sufficient to fully and accurately document the nature, scope, details and receipt of the health care provided to persons eligible for medical assistance under this Code, in accordance with regulations promulgated by the Illinois Department. The rules and regulations shall require that proof of the receipt of prescription drugs, dentures, prosthetic devices and eyeglasses by eligible persons under this Section accompany each claim for reimbursement submitted by the dispenser of such medical services. * * *" Ill. Rev. Stat. 1979, ch. 23, par. 5—5.

The Department of Public Aid has promulgated the following regulation:

"Sec. 111 *Requirement*

Requirements for providers approved for participation include but are not limited to the following:

* * *

(11) Maintenance and retention of business and professional records sufficient to fully and accurately document the nature, scope and details of the health care provided." Medical Assistance Handbook, section, I, ch. 100, sec. 111(11).

Finally, DPA form 132, which a physician submits to the Department for payment contains the following cer-

tification: "I hereby agree to keep such records as are necessary to disclose fully the extent of services provided to individuals under Title XIX of the Social Security Act and to furnish information regarding any payments claimed as the State Agency may request." Respondent filed a number of these forms with the Department and received payment for services rendered.

•1 It is thus obvious that respondent was required to maintain a certain type of record by virtue of his participation in the Medicaid program. There is no evidence in the record that the records sought by the subpoena were not required to be maintained under the Medicaid program. We therefore conclude that the subpoena seeks the production of records which are required to be maintained, and therefore are required records.

Once this initial question is answered, we must determine whether the three-pronged test of *Grosso* is satisfied. (See *People* v. *Mileris* (1981), 103 Ill. App. 3d 589, 594, 431 N.E.2d 1064.) If this test is satisfied, then the "required records" exception applies. Respondent concedes that his medical records are of a type customarily kept by him, but vigorously contends that the other two prongs are not satisfied.

•2 Next, we consider whether the purpose of the record keeping requirement is essentially regulatory. Respondent argues that because his records are sought by a grand jury investigating him for possible criminal violations, the reason for which his records are sought is not regulatory. Respondent is improperly attempting to shift the focus away from the purpose for which the records are required to be kept to the purpose for which they are sought. The purpose of the record keeping requirement here is to monitor the operation of the Medicaid program, not to catch criminals. This contrasts to the wagering reporting requirement struck down in *Marchetti* v. *United States* (1968), 390 U.S. 39, 19 L. Ed. 2d 889, 88 S. Ct. 697. We cannot say that the class of all doctors participating in the Medicaid program is a "'selective group in-

herently suspect of criminal activities.'" *Marchetti* v. *United States* (1968), 390 U.S. 39, 57, 19 L. Ed. 2d 889, 903, 88 S. Ct. 697, 707; *Albertson* v. *Subversive Activities Control Board* (1965), 382 U.S. 70, 15 L. Ed. 2d 165, 86 S. Ct. 194; *In re Grand Jury Proceedings* (5th Cir. 1979), 601 F.2d 162, 168.

Our conclusion that this record keeping requirement is essentially regulatory is buttressed by reference to *In re Grand Jury Proceedings* (5th Cir. 1979), 601 F.2d 162; *United States* v. *LaPage* (N.D.N.Y. 1977), 441 F. Supp. 824, and *United States* v. *Cubeta* (D. Conn. 1979), 369 F. Supp. 242. In each of these cases, required records were used against the defendant in criminal proceedings. However, the purpose of the record keeping requirement was, in each case, essentially regulatory. (*In re Grand Jury Proceedings* (customs regulation); *LaPage* (health and disease control); *Cubeta* gun control).) Accordingly, we hold that this prong of the *Grosso* test is satisfied.

•3 The final prong which must be satisfied by the State is that "the records themselves must have assumed 'public aspects' which render them at least analogous to public documents.") *Grosso* v. *United States* (1968), 390 U.S. 62, 68, 19 L. Ed. 2d 906, 912, 88 S. Ct. 709, 713. Since these records may be inspected by officials of the Department of Public Aid for documentation of claims and analysis of the operation of the Medicaid system, we conclude that they have assumed "public aspects." See *People* v. *Mileris* (1981), 103 Ill. App. 3d 589, 594; *United States* v. *Cubeta* (D. Conn. 1974), 369 F. Supp. 242, 244.

•4 In summary, we hold that respondent cannot assert the privilege against self-incrimination because of application of the "required records" exception to that privilege, provided that the records requested by subpoena are limited to those required to be maintained by law. With this proviso, we affirm the holding of the circuit court.

II

Respondent also contends that the medical records are protected from disclosure by the physician-patient privilege (Ill. Rev. Stat. 1981, ch. 110, par. 8—802),[1] which provides in relevant part: "No physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve such patient, except only * * * (3) with the expressed consent of the patient * * *."

The State contends that execution of the forms entitled "Authorization for Release of Medical Information" by the patients constituted waiver of the privilege. Respondent argues that these forms do not constitute sufficient waivers because they are overly general and broad in scope. Resolution of this issue requires the accommodation of two competing interests: the interest of the patient in confidentiality, and the interest of the public in the grand jury obtaining all relevant information. See *People* v. *Bickham* (1982), 89 Ill. 2d 1, 5-6, 431, N.E.2d 365; see generally *Parkson* v. *Central DuPage Hospital* (1982), 105 Ill. App. 3d 850, 854, 435 N.E.2d 140.

The General Assembly has recognized the patient's interest in maintaining confidentiality in dealings with a physician by its creation of the physician-patient privilege. (*People* v. *Bickham* (1982), 89 Ill. 2d 1, 6.) The purpose of the privilege is to encourage free disclosure between the physician and the patient, and to protect the patient from the embarrassment and invasion of privacy that disclosure would entail. (*People* v. *Bickham* (1980), 90 Ill. App. 3d 897, 901, 414 N.E.2d 37, *aff'd* (1982), 89 Ill. 2d 1, 431 N.E.2d 365.) The privilege exists for the protection of the patient. 81 Am. Jur. 2d *Witnesses* sec. 231 (1976).

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[1] Prior to July 1, 1982, this statutory provision was codified as ch. 51, par. 5.1. No substantive change was made by the recodification.

In conflict with the patient's interest in confidentiality is the public's interest, recognized by the courts, in "maintaining the breadth of the grand jury's power to conduct investigations regarding criminal violations." (*People* v. *Bickham* (1982), 89 Ill. 2d 1, 5-6, citing *People* v. *Dorr* (1970), 47 Ill. 2d 458, 462, 265 N.E.2d 601, *cert. denied* (1971, 402 U.S. 929, 28 L. Ed. 2d 863, 91 S. Ct. 1527.) Generally, "'the public . . . has a right to every man's evidence.'" (*Branzburg* v. *Hayes* (1972), 408 U.S. 665, 688, 33 L. Ed. 2d 626, 644, 92 S. Ct. 2646, 2660.) The purpose of the grand jury's investigation is not only to cause the prosecution of the guilty, but also to protect the innocent from unfounded criminal prosecutions. (*Branzburg* v. *Hayes* (1972), 408 U.S. 665, 686-87, 33 L. Ed. 2d 626, 643, 92 S. Ct. 2646, 2659.) Society's interests are thus best served by a thorough and broad investigation. The grand jury must pursue all available clues and examine all witnesses. The "investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors." (*Branzburg* v. *Hayes* (1972), 408 U.S. 665, 701, 33 L. Ed. 2d 626, 651, 92 S. Ct. 2646, 2667.) The investigation must of necessity be broad in scope.[3]

•5 We must conclude, in light of these principles, that the forms entitled "Authorization for Release of Medical Information" constituted valid waivers of the physician-patient privilege in accordance with section 8—802(3) of the Code of Civil Procedure. (Ill. Rev. Stat. 1981, ch. 110, par. 8 —802(3).) These authorizations were read and explained to each patient, and were signed in the presence of IDLE agents who testified in court and were subject to cross-examination by respondent. Respondent was un-

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[3] For a discussion of the competing interest, see our decision *People* v. *Florendo* (1981), 95 Ill.App. 3d 601, 420 N.E.2d 506, *appeal allowed* (1982), 88 Ill. 2d 552.

able to produce any evidence to suggest that the authorizations were anything but intelligent and voluntary waivers of the physician-patient privilege. A contrary ruling would unduly restrict the broad powers of the grand jury. Accordingly, the circuit court correctly held that the physician-patient privilege did not protect from disclosure the medical records sought by the subpoena.

The judgment of the circuit court of Cook County is affirmed.

Affirmed.

STAMOS, P.J., and PERLIN, J., concur.

"EXHIBIT B"

ILLINOIS SUPREME COURT
Juleann Hornyak, Clerk
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

October 5, 1982

Mr. James I. Marcus
Attorney at Law
111 W. Washington St., S#1866
Chicago, IL 60602

No. 57191 - People State of Illinois, respondent, vs. Richard A. Herbert, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Juleann Hornyak
Clerk of the Supreme Court

No. 82-916

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD A. HERBERT,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Illinois Appellate Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether the trial court correctly found that petitioner wilfully refused to comply with the grand jury's subpoena *duces tecum* for certain business records.

Whether the trial court correctly found that the petitioner's business records subpoenaed by the grand jury fell within the scope of the "required records" doctrine and therefore were not entitled to Fifth Amendment protection.

Whether the required records doctrine applies to grand jury proceedings.

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The petitioner was held in contempt of court by the Chief Judge of the Circuit Court of Cook County, Illinois, for refusing to comply with a subpoena *duces tecum* issued by a grand jury. The decision of the trial court was affirmed by the Illinois Appellate Court (No. 81-1798, July 20, 1982). See Petitioner's Appendix A. Petitioner's petition for leave to appeal to the Illinois Supreme Court was denied on October 5, 1982. See Petitioner's Appendix B.

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. §1257(3). However, as treated more fully below, respondent submits that no good reason exists for this Court to exercise its sound judicial discretion and grant the instant petition for a writ of certiorari.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., amendment V provides, in pertinent part, that:

> [No person] shall be compelled in a criminal case to be a witness against himself. . . .

STATEMENT OF FACTS

The facts relevant to the issues raised by petitioner are adequately set forth in the opinion of the court below, and need not be restated at length. Respondent directs this Court's attention to the argument portion of this Brief in Opposition, wherein the facts pertaining to the claim of error are discussed.

REASON FOR DENYING THE WRIT

BUSINESS RECORDS WHICH ARE REQUIRED TO BE MAINTAINED BY STATE AND FEDERAL LAW FALL WITHIN THE SCOPE OF THE "REQUIRED RECORDS" DOCTRINE THEREBY PRECLUDING THE ASSERTION OF THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION. FURTHERMORE, THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING THE APPLICATION OF THIS DOCTRINE.

The petitioner presents three bases for his claim that the target of a grand jury investigation cannot be deprived of his Fifth Amendment privilege against self-incrimination by operation of the "required records" doctrine. The respondent shall answer all three of these grounds in one argument as they are intertwined. In any event, the grounds raised by petitioner do not form a sufficient basis upon which to grant a writ of certiorari.

It is firmly established that the "required records" doctrine is a limitation on the Fifth Amendment privilege against self-incrimination. This Court, in *Shapiro v. United States*, 335 U.S. 1 (1947), held that records required to be kept, pursuant to a valid federal law or administrative regulation, are not privileged documents within the meaning of the Fifth Amendment.

In *Shapiro*, the Office of Price Administration subpoenaed the sales records of a defendant who was a private individual doing business as an unincorporated enterprise. This Court stated that his sales records were:

> Required to be maintained under an appropriate regulation, its relevance to the lawful purposes of the Administration, and the transaction which it recorded were ones in which the petitioner could lawfully engage solely by virtue of the license granted him under the statute.

335 U.S. at 35.

In *Grosso v. United States*, 390 U.S. 62 (1968), this Court established a three-pronged test to be employed in determining whether the "required records" doctrine precludes Fifth Amendment protection. The three factors are: (1) the purpose of the record-keeping requirement must be essentially regulatory; (2) the records must be of a kind customarily kept; and (3) the records themselves must have assumed public aspects. 390 U.S. at 67-68.

The petitioner concedes that his records are of the kind customarily kept by him. (Pet.'s Br. at 9) His dispute lies with the first and third prongs of the *Grosso* test.

The Illinois Medical Assistance Program is administered by the Department of Public Aid under Article V of the Illinois Public Aid Code. This program implements Title XIX of the Social Security Act (Medicaid) and is the statutory responsibility for the formulation of policy in conformance with federal and state requirements. *Medical Assistance Handbook*, Section I, Chapter 100, §101.

Of course, the rules promulgated by the department must be consistent with the minimum requirements of the federal statute. The federal records requirements of the Social Security Act are contained in 42 U.S.C. §1396a, which states, in part, that:

(a) A State plan for medical assistance must

* * *

(27) Provide for agreements with every person or institution providing services under the State plan, under which such person or institution agrees (A) to keep such records as are necessary fully to disclose the extent of the services provided to individuals receiving assistance under the State plan, and (b) to furnish the State agency with such information, regarding any payments claimed by such person or institution for providing services under the State plan, as the State agency may from time to time request. . . .

The Illinois Public Aid Code is contained in Chapter 23 of the Illinois Revised Statutes (1979). Section 12-13 specifically confers upon the Department of Public Aid the authority to promulgate rules and regulations to implement the other parts of the Code. Section 12-13 provides, in part, that:

§12-13 Rules and regulations. The Department shall make all rules and regulations and take such action as may be necessary or desirable for carrying out the provisions of this Code, to the end that its spirit and purpose may be achieved and the public aid programs administered efficiently throughout the State. . . .

Ill. Rev. Stat., 1979, ch. 23, § 12-13.

A similar provision authorizing the Department of Public Aid to promulgate rules is found at Section 5-5 of the Code. *Ill. Rev. Stat.*, 1979, ch. 23, § 5-5.

The Department has established two vehicles for ensuring that proper records are kept. It has promulgated general regulations and requires a provider agreement before funds are dispersed to a provider. That provision, which requires that records are to be kept by a partici-

pating provider in the program, is contained in Section I, Chapter 100, § 111(11), of the *Medical Assistance Handbook*, which provides, in part, that:

> Requirements for providers approved for participation include but are not limited to the following:
>
> * * *
>
> 11) Maintenance and retention of business and professional records sufficient to fully and accurately document the nature, scope and details of the health care provided.

This rule is mandated by Illinois statute. *Ill. Rev. Stat.*, 1979, ch. 23, § 5-5 (effective October 1, 1976), in part, provides that:

> All dispensers of medical services shall be required to maintain and retain business and professional records sufficient to fully and accurately document the nature, scope, details and receipt of the health care provided to persons eligible for medical assistance under this Code, in accordance with regulations promulgated by the Illinois Department. The rules and regulations shall require that proof of the receipt of prescription drugs, dentures, prosthetic devices and eyeglasses by eligible persons under this Section accompany each claim for reimbursement submitted by the dispenser of such medical services.

As a condition of participating in the Medicaid program, Dr. Richard Herbert agreed "to keep such records as are necessary to disclose fully the extent of services provided to individuals receiving assistance and reasonable information regarding payments claimed as the Department may from time to time request."

The petitioner, then, voluntary submitted himself to the regulation requirements without any expectation of

privacy in any records later requested by subpoena. Further, he could not have any expected privacy notwithstanding the agreement, since to participate, he was subject to the general records requirement of the Illinois Department of Public Aid (IDPA). Petitioner's assertion that he did not "waive" his Fifth Amendment protection is therefore erroneous because no Fifth Amendment protection ever attached to the records he was required to maintain. Each bill for services rendered to recipients under the Medicaid Program that respondent submitted to the IDPA contained a certification that had to be completed by the submitter of the bill. In part, the certification reads:

> I hereby agree to keep such records as are necessary to disclose fully the extent of services provided to individuals under TITLE XIX of the Social Security Act and to furnish information regarding any payments claimed as the State Agency may request.

Since petitioner could not have contemplated any Fifth Amendment privilege, there was no Fifth Amendment privilege to waive.

Furthermore, the court below correctly found that the purpose of the record keeping requirement was regulatory stating that the "purpose of the record keeping requirement here is to maintain the operation of the Medicaid program, not to catch criminals." (See Pet. Br. Appendix A at 7a) That court correctly turned aside the petitioner's argument, which he now presents to this Court, that the purpose for seeking the records was to institute criminal prosecutions not regulation of the Medicaid program. Thus, petitioner's reliance on *Haynes v. United States*, 390 U.S. 85 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); and *Marchetti v. United States*, 390 U.S. 39 (1968), is simply without merit as those cases involved the requirement of reporting crimi-

nal activities. It cannot be said that the class of all doctors participating in the Illinois Medicaid program is a "selective group inherently suspect of criminal activities." *Marchetti*, 390 U.S. at 57.

Furthermore, the conclusion that the record keeping requirement is essentially regulatory is strengthened by the decisions in *In re Grand Jury Proceedings*, 601 F.2d 162 (5th Cir. 1979); *United States v. LaPage*, 441 F. Supp. 824 (N.D. N.Y. 1977); and *United States v. Cubeta*, 369 F.Supp. 242 (D. Conn. 1979). The record keeping requirement in each case was regulatory. *Cubeta* dealt with gun control, *LaPage* concerned health and disease control, and *In Re Grand Jury Proceedings* required records to be kept for customs regulation. Each case held that the required records could be used in criminal proceedings. Accordingly, the court below correctly concluded that the first prong of the *Grosso* test was satisfied.

As for the third prong of the *Grosso* test, the records herein have assumed a "public aspect" as they may be inspected by state officials in order to regulate the operation of the Medicaid system. *United States v. Cubeta*, 369 F.Supp. 242, 244 (D. Conn. 1974). Therefore, the court below was correct in its *Grosso* analysis.

As the records in the instant case fall within the scope of the "required records" doctrine, the Fifth Amendment privilege against self-incrimination is precluded and the petitioner must comply with the records subpoena as issued by the grand jury. Both state and federal regulations promulgated pursuant to valid statutes require the retention of records for all treatment rendered to patients under the Illinois Medicaid Program. Petitioner could not have contemplated that the business records were privileged or private because the statutes

require the providing of information in aid of a valid regulatory control over activities involving a public interest.

Finally, there is no conflict among the circuits in applying the "required records" doctrine. The petitioner's sole authority of *United States v. Plesons*, 560 F.2d 980 (8th Cir. 1977), is completely inapposite to the case at bar. The court there, in *dicta*, held that the doctor's notes concerning his patients may have been privileged. Those notes were not records made and kept pursuant to valid statutes and regulations. They were merely a doctor's personal notes concerning his patients. Respondent submits that the cases of *In re Grand Jury Proceedings*, *supra*, *LaPage*, *supra*, and *Cubeta*, *supra*, as discussed above, show uniformity among the circuits in applying the "required records" doctrine.

As the petitioner has failed to raise any important constitutional issue or present any grounds which would justify the consumption of this Court's valuable time, the instant petition for writ of certiorari should be denied.

CONCLUSION

For all the foregoing reasons, respondent respectfully prays that this Honorable Court deny the instant petition for Writ of Certiorari.

Respectfully submitted,

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